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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

RICKY TYRONE FOSTER,

Defendant and Appellant.

F069125

(Super. Ct. No. CF93499134)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Fresno County. Jonathan B. Conklin, Judge.

John F. Schuck, under appointment by the Court of Appeal, for Defendant and Appellant.

Office of the Attorney General, Sacramento, California, for and Plaintiff and Respondent.

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* Before Levy, Acting P. J., Cornell, J. and Gomes, J.

Ricky Tyrone Foster was convicted of numerous crimes in 1994 and was sentenced to a term of life in prison. The judgment was affirmed on direct appeal (*People v. Foster* (1995) 34 Cal.App.4th 766 (*Foster*)). Since that time Foster has filed numerous petitions in an attempt to secure his release. His latest effort was a petition for a writ of error *coram nobis*. The trial court denied the petition and Foster appealed. Appellate counsel filed a brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436 asserting he did not identify any arguable issues in this appeal. By letter dated June 2, 2014, we invited Foster to submit additional briefing. Foster submitted numerous documents in response to our invitation. As explained below, there is no merit to any of Foster's arguments, resulting in an inability to present a prima facie case for relief. Accordingly, we will dismiss the appeal.

FACTUAL AND PROCEDURAL SUMMARY

On November 29, 1993, Foster was charged by information with numerous crimes, including carjacking (Pen. Code, § 215, subd. (a))¹, kidnapping during a carjacking (§ 209.5, subd. (a)), and assault with a firearm (§ 245, subd. (a)(2)). On January 26, 1994, Foster was convicted of the above offenses, as well as other charged offenses, and the jury found a firearm enhancement (§ 12022.5, subd. (a)) true. He was sentenced to a term of life with the possibility of parole, plus 12 years in prison.

As stated above, we affirmed the judgment on direct appeal. The record in this appeal, while perhaps not complete, demonstrates that Foster has been filing documents in both the state and federal courts, with virtually no success, since the judgment was affirmed on direct appeal. In this instance, Foster filed a petition seeking a writ of error *coram nobis*.²

¹All further statutory references are to the Penal Code unless otherwise stated.

²The record is unclear regarding the petition. By letter dated February 20, 2014, Foster stated he was making a second submission of a petition because no response was

Foster's petition stated he was seeking to vacate the judgment against him as it was "wrongfully and unconstitutionally rendered." In his declaration, Foster asserts there were errors of fact in the trial proceedings. Although it is difficult to ascertain what the alleged factual errors were, Foster asserts these facts do not appear in the record, and the trial court was not aware of these facts when judgment was entered.

The next document, titled "Statement of the Case," appears to be part of his argument. The facts in the case, however, do not appear to be from the trial but from police reports, as well as from Foster's recollection of the events. Since we do not have access to the trial transcript, we cannot be sure of the origin of the statements. We are certain that these facts were not included in the opinion in the direct appeal because many of the assertions made by Foster were not included therein. Of interest, Foster claims the victim was allowed to identify him as the perpetrator, even though Foster already had requested counsel, and Foster asserts a hearing was held outside of his presence when the public defender's office declared a conflict.

The first ground for relief stated by Foster is the absence of a court reporter's transcript of court hearings held on October 28, 1993 (hearing on the motion of the public defender's office declaring a conflict of interest), December 22, 1993 (hearing on the prosecution's motion to compel a blood draw and hair exemplar), January 10 (unidentified trial proceeding), 18 (unidentified trial proceeding), and 20, 1994 (unidentified trial proceeding).

Foster contends that on October 28, 1993, the trial court held a hearing that was not reported, which resulted in a determination that a conflict existed between Foster and

heard regarding his first submission. He attached as exhibits numerous documents. The trial court apparently treated these documents as the petition, although there is no file-stamped copy of the petition in the file. We will proceed as if these documents constitute the petition to which the trial court responded, which appears to be the only logical way to proceed in this matter.

the public defender's office. According to Foster he was denied his right to be present at the critical stage of the proceeding.

Foster next asserts that on November 8, 1993, at the time set for the preliminary hearing, the trial court met with the attorneys outside of his presence. Inexplicably, Foster concludes an unreported hearing was held outside of his presence that resulted in a conflict being declared and the public defender's office being excused from representing him. Upon his request in 2005, Foster admits he was provided with a copy of the declaration filed by the public defender's office declaring a conflict. Foster concludes he could not have filed this motion in a more timely fashion because of the lack of a reporter's transcript.

Foster next argues that as a result of his efforts to obtain a copy of the court reporter's transcript of the hearing at which a conflict was declared, he was provided with records that suggested additional hearings were held outside of his presence, i.e., the hearings listed above. Foster acknowledges he was present for his trial that started on January 24, 1994, but asserts he was not present for those other proceedings. He further contends those proceedings were not reported by the court reporter.

Foster next appears to argue he was prejudiced by the failure to produce the record of those hearings because he was innocent. In essence, Foster contends the prosecution's evidence was weak, while evidence of his innocence was available but not introduced into evidence due to the incompetence of trial counsel. This evidence, according to Foster, was provided by witness Trina Myers. Foster asserts that Myers "in fact 'exonerated'" him from being a participant in the shooting.³

³We note we rejected a similar claim in the direct appeal where we noted "Myers testified that after the shooting, she did not see where either man went. However, she was later taken to an ambulance ... where she identified Foster." (*People v. Foster* (May 1, 1995, F021241 [nonpub. opn.].)

Foster contends his innocence was established by a statement contained in a police report that was attributed to Myers. In this statement Myers told the police the individual being shot at was wearing a black Oakland Raiders jacket, and she thought this person may have been her brother or cousin. According to Foster, he did not own or wear such a jacket. This statement never was introduced into evidence, according to Foster, because of the incompetence of counsel. Foster concludes this section by suggesting that this petition was timely because it could not have been brought earlier.

The second ground for relief is either a claim of prosecutorial misconduct or vindictive prosecution. This claim was based on the assertion that Myers's statement to the police conclusively established Foster's innocence. According to Foster, because of Myers's statement to the police, he never should have been charged with any crime related to this incident. Moreover, when Myers identified Foster at trial, it was because she was coerced or coached by the prosecutor.

As a result of these errors, Foster requested (1) an evidentiary hearing on his claims, (2) his conviction be vacated, (3) a declaration that he was innocent, and (4) any other relief the court deemed proper.

The relevant documents attached to the petition showed that the public defender's office filed a declaration of conflict on October 28, 1993. One document was a letter sent to Foster by the public defender's office dated July 21, 2005. This letter apparently was sent in response to a letter from Foster. In this letter the public defender's office informed Foster it did not have a file for his case, most likely because it conflicted out of the case almost immediately. Because there was no file, the public defender's office could not discern the reason a conflict was declared. The documents also show several efforts by Foster to obtain a reporter's transcript of the October 28, 1993, hearing. One of those documents was an order from the Fresno County Superior Court denying such a request. In that order, the court noted its records showed no hearing occurred on that date.

Another document attached as an exhibit to the petition is the portion of the police report on which Foster relies to “prove” his innocence. The relevant portion of this report states:

“Witness Myers stated that she was coming from school this evening and observed a traffic accident in the roadway at California and Kern Ave. She saw two black males fighting in the road. One fighter was very muscular, and the other fighter was thin.

“This witness stated that she observed the heavy male run away from the fight. As he was running, the thin guy chased him and fired three shots into the heavy man’s back with a small handgun.

“Witness Myers stated she heard three shots fired, and saw the muzzle flash each time. Myers believed the victim was her brother (Darry West) or her cousin (Rodney Fuse).

“Myers did not get a good look at the victim. She noticed the victims [*sic*] jacket which resembled a jacket her brother owns. (A black Raiders jacket).”

A copy of Myers’s trial testimony was provided. In this testimony Myers stated she saw the vehicle, saw two men fighting, and observed one was wearing a Raiders jacket. She did not see their faces. After she saw one of the men get shot, she left the scene. She later was taken by police officers to an ambulance where she saw Foster inside the ambulance. She did not, in this part of her testimony, identify Foster as one of the people involved in the fight.

The trial court denied Foster’s petition. In its written order the trial court noted there was no hearing on the motion to withdraw filed by the public defender’s office, the transcripts of the remaining court proceedings identified by Foster were not a part of the normal record on appeal, and no motion was made to augment the record. Finally, the trial court rejected Foster’s claim of factual innocence as not properly raised in a petition for a writ of error *coram nobis*.

DISCUSSION

A petition for a writ of error *coram nobis* is a type of motion to vacate the judgment and “the two procedures are similar in scope and effect.” (*People v. Gallardo* (2000) 77 Cal.App.4th 971, 982.) A petition for writ of error *coram nobis* generally is used to bring factual errors or omissions to the trial court’s attention. “The writ will properly issue only when the petitioner can establish three elements: (1) that some fact existed which, without his fault or negligence, was not presented to the court at the trial and which would have prevented the rendition of the judgment; (2) that the new evidence does not go to the merits of the issues of fact determined at trial; and (3) that he did not know nor could he have, with due diligence, discovered the facts upon which he relies any sooner than the point at which he petitions for the writ.” (*People v. Soriano* (1987) 194 Cal.App.3d 1470, 1474.)

A denial of a petition for a writ of error *coram nobis* is not appealable unless the petition states a prima facie case for relief. (*People v. Totari* (2002) 28 Cal.4th 876, 885, fn. 4 [“In an appeal from a trial court’s denial of an application for the writ of error *coram nobis*, a reviewing court initially determines whether defendant has made a prima facie showing of merit; if not, the court may summarily dismiss the appeal.”]; see *People v. Dubon* (2001) 90 Cal.App.4th 944, 950 [“trial court’s denial of a *coram nobis* petition is an appealable order, unless the *coram nobis* petition failed to state a prima facie case for relief”].)

Foster has failed, once again, to state a prima facie case for relief. After appellate counsel filed his *Wende* brief, Foster filed numerous documents in this court. The relevant documents are titled “Appellant’s Supplemental ‘Letter’ Brief, pursuant to *People v. Wende* (1979) 25 Cal.3d 439; *People v. Skenandore* (1982) 137 [Cal.App.]3d 922, 924, 187 CR 368,” filed June 17, 2014, and “Appellant’s (Amended) Supplemental ‘Letter Brief’ per to: *People v. Wende*, (1979) 25 Cal.3d 439; and *People v. Skenandore*,

(1982) 137 Cal.3d 922, 924, 187 CR 368,” filed January 15, 2015. Foster also filed two other documents titled “Appellant’s Notice of Reason(s) for ‘Amending’ Letter-Brief for Good Cause Showing. (‘Retaliations’),” filed January 15, 2015, and “Re: Reply Brief filed May 28, 2014,” filed March 19, 2015. A third document submitted by Foster, titled “Addendum to ‘Letter Brief’ Filed: June 17, 2014. For Good Cause,” was not filed but was stamped “Received” by this court. We have reviewed each of these documents thoroughly.

We begin by noting the documents filed by Foster are less than clear. It appears to us that his primary complaint is that he was not present for hearings that occurred on October 28, 1993, December 22, 1993, January 10, 18, and 20, 1994. The first problem with these claims is that the record created by Foster does not support his claims. Other than his own assertions, which are not evidence, the only document he has supplied to support his argument is some type of printout from a portion of the trial court’s record. It would appear this printout was provided by a court employee in an attempt to show Foster that no hearing occurred on a specific date. It is not verified or authenticated, so it has no evidentiary value.

The second problem with these claims is that, even if we were to consider this printout, it does not support his assertion that hearings occurred on the identified dates. October 28, 1993, refers to the date the public defender’s office filed a notice of conflict and requested it be relieved from representing Foster. No hearing occurred on that date. December 22, 1993, appears to refer to the day the prosecutor filed a motion to obtain blood and hair samples from Foster. No hearing occurred on that date. Instead, the printout provided by Foster suggests the hearing occurred on December 29, 1993, and that he and counsel were present on that date. The reference to the January 1994 dates on the printout all contain the notation “NO COMMENT,” which suggests nothing occurred on those dates. We again observe the record is insufficient to reach a definitive conclusion on what did or did not occur on those dates. We also note that if a hearing

occurred on those dates, there would be minute orders in the clerk's transcript reflecting what proceedings actually occurred and whether Foster was present. The clerk's transcript was produced for Foster's direct appeal. Since all of the *facts* that could possibly support his claim were available to Foster in his direct appeal, his application of a writ is devoid of merit because there are no newly discovered *facts*.

We emphasize that we are not suggesting there now is, or ever was, any merit to Foster's argument. Rather, we point out only that if the record did support his argument, the relevant portions of the record were available to Foster in 1994. Accordingly, he has not produced any newly discovered evidence related to this argument, which precludes writ relief.⁴

We also note that there is no possible interpretation of the statement Myers made to the police that would establish Foster was innocent. Moreover, once again, this information was available to Foster during trial and cannot be considered newly discovered evidence.

DISPOSITION

The appeal is dismissed.

⁴Foster also argues his appellate counsel was ineffective and requests appointment of a specific attorney to handle this appeal. We rejected this argument by order filed May 22, 2014.